Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

PHILLIP MIZRACH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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as Successor Personal
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QUESTIONS PRESENTED

1. Whether a District Court can waive or cede its jurisdiction over a case to another forum which is lacking substantive and fundamental jurisdiction based on 28 U.S.C. §1346(b)(1), a state statute which calls its provisions procedural, and the common law?

2. Whether the Federal Tort Claims Act (the "FTCA") completely preempts any State preliminary filing procedure based on a statute, 28 U.S.C. §1346(b)(1), which authorizes exclusive federal jurisdiction on Federal question cases that are subject to the exclusively federal remedial scheme established in the FTCA for cases of medical malpractice at the Veterans Administration?

3. Whether the government should be sanctioned for directing a claimant to file an action in what it contends in case filings to be the wrong forum, failing to update a regulation it controls and contends it adheres to, and for misleading notices it sends to claimants causing them to file in the allegedly wrong forum?

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PETITION FOR A WRIT OF CERTIORARI

Phillip Mizrach, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Petitioner's Appendix ["App."] App. 1-3) is not reported. The order of the court of appeals denying Phillip Mizrach's petition for rehearing and rehearing en banc is not reported (App. 13). The opinion of the district court (App. 7-8) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2009. Phillip Mizrach timely filed a petition for rehearing and for rehearing en banc. The court of appeals denied the petition for rehearing and for rehearing en banc on January 26, 2010.

The jurisdiction of this Court is invoked under Supreme Court Rule 13.1 and 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The text of constitutional provisions, statutes, and regulations involved in the case is set out in the accompanying Appendix.

STATEMENT

A. Overview

This case lies at the intersection of a determined intent to be consistent by certain courts as opposed to the need by them to follow the dictates of statutes on the most basic of jurisdictional issues and this Court's decisions on interpretation. Thus, Petitioner who followed the dictates of the Federal Tort Claims Act (the "FTCA"), and filed a timely administrative claim and follow-on suit in the Federal District Court, as required by 28 U.S.C. § 1346 (b)(1), was told that the case would be dealt with as if it were a diversity case and would be dismissed. He was told that he should instead file a claim in a forum (under Maryland's Health Care Malpractice Claims Act [the "MHCMCA]") which has no fundamental jurisdiction over a federal question case. The Court's precedent's on interpretation and jurisdiction were completely ignored. In addition, Petitioner believes that the

"complete preemption" doctrine applies to this matter. The government's conduct in attempting to gain advantage by misleading claimants as to the state of precedent, and the need for a sanction to discourage it, is appropriate for the Court to address.

B. Summary of Facts

Petitioner represents the estate of a veteran, Mr. Abraham I. Kurland, who, during the time in question, received medical care at the Veterans Affairs Medical Center ("VAMC") in Baltimore, Maryland. Mr. Kurland was admitted to the VAMC in March of 2003, and was also treated at the Baltimore Rehabilitation and Extended Care Center. Mr. Kurland was transferred to Union Memorial Hospital, where he was treated from April 6, 2003 to April 14, 2003. He was then transferred back to the VAMC where he was treated until his death on May 3, 2003. Petitioner timely filed an administrative tort claim under the FTCA with the Department of Veterans Affairs. After that claim was finally denied on February 7, 2008, he filed the instant suit on August 5, 2008. Petitioner's Complaint alleges that the United States, through the actions of personnel at the VAMC, negligently breached the reasonable standard of medical care, and that severe neglect

and deliberate indifference occurred leading to Mr. Kurland's death. The Complaint mentions that Mr. Kurland was given a medication he was stated to be allergic to, and that after an order was made for him to be transferred to the intensive care unit, he was abandoned, not transferred, and not supervised. See Complaint at ¶ 12. Prior to filing suit, Petitioner did not file a claim in Maryland's malpractice office and did not file a certificate from an expert there attesting to a departure from the standard of care based on statutes and advice which indicated it did not pertain to a federal question case.

C. Course of Proceedings Below

This action was initiated pursuant to the FTCA, 28 U.S.C. §§ 1346(b)(1), 2671-2680. On August 5, 2008, the Petitioner filed a complaint, pro se, in the District Court for the District of Maryland alleging that negligence on the part of medical providers at the Veterans Affairs Medical Center, located in Baltimore, Maryland, caused Mr. Abraham I. Kurland's death. The one-count complaint sought recovery as a survival action.

On October 7, 2008, prior to service even being obtained on it or discovery being had, the United States filed a motion to dismiss based on its contention that Petitioner's failure to satisfy

Maryland prerequisites to filing a medical malpractice suit, and filing a claim for medical malpractice with the Maryland office that dealt with malpractice claims was substantive law that applied in a Federal question case. In the motion, the United States claimed that because the FTCA mandates that the United States be treated as a private party in like circumstances, 28 U.S.C. § 2674, Petitioner was required to file a "claim" and an expert certificate of merit with the state's office before initiating a suit. Md. Code Ann., Cts. & Jud. Proc. §§3-2A-04(a), 3-2A-04(b)(1), and that, dismissal without prejudice was the appropriate remedy.

On November 6, 2008, Petitioner opposed the government's motion on the grounds that the government's motion was premature, that the Maryland statute did not apply based on its language that it was procedural (Md. Code Ann., Cts. & Jud. Proc. §3-2A-10), and also the FTCA's language that the United States District Court had exclusive jurisdiction. The Maryland law on interpretation of a statute was cited [*Kushell v. Dep't of Naural Resources*, 385 Md. 563, 576-77, 870 A.2d 186, 193-94 (2005)], as was the fact that authority cited by the government in its motion dealt with other cases which were based on either dicta or diversity jurisdiction. The Petitioner also mentioned that the Maryland act was found

to be a prerequisite to filing suit in Maryland but was not an exhaustion of administrative remedy requirement and jurisdictional under the FTCA based on *Oxtoby v. McGowan*, 447 A.2d 860, 865 (Md. 1982). Petitioner indicated that with no Maryland Defendant there was no basis to give jurisdiction to file a Maryland claim, that the Maryland statute conflicted with the FTCA, that different limitations periods were involved in the two statutes, and that the final denial letter from the Veterans Administration's agents mentioned filing suit in the U.S. District Court as the procedure to follow. Petitioner noted that under *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136 (1965), policy considerations had to be considered by the Court as regards what was substantive law and not merely a mechanical outcome test. Petitioner alternatively moved the District Court to stay the proceedings to allow Petitioner to satisfy the Maryland requirements as had been allowed in a similar case (*Anderson v. United States*, Case 1:08-cv-00003-CCB [D.Md. August 8, 2008]).

On December 24, 2008, the United States replied to Petitioner's opposition and opposed Petitioner's motion to stay on the grounds that a stay was inappropriate and futile since Maryland's statute of limitations applied in this case and barred the Maryland claim.

While a hearing had been requested by the Petitioner, none was held. The District Court granted the United States' motion on February 17, 2009, and dismissed the suit without prejudice. The District Court stated that Petitioner had failed to exhaust his remedies before the Maryland office, as required by the Maryland Health Care Malpractice Claims Act (the "HCMCA"), before filing the instant suit, and mentioned authority from a diversity case (*Lewis v. Waletzky*, 576 F.Supp.2d 732 [D.Md. 2008]) for the ruling. In that same order, the District Court denied Petitioner's motion for a stay of the proceeding and found that dismissal without prejudice was the appropriate remedy.

On February 27, 2009, Petitioner moved to alter the judgment pursuant to Fed. R. Civ. Proc. 59(e). In the post-judgment motion, Petitioner directly mentioned that additional discovery was needed, that the application of the Maryland procedure was unconstitutional and violated due process, and that the government should have been estopped from arguing for dismissal for Petitioner's failure to comply with the HCMCA as Petitioner had relied on misleading communication from the government in proceeding directly to Federal District Court. Petitioner noted that no supplemental action existed for a Maryland suit and jurisdiction, and

that a diversity case is completely different than a federal question case based on the process that the statutes created. The District Court denied Petitioner's motion on March 11, 2009.

On April 7, 2009, Petitioner filed his appeal. Jurisdiction was proper, as the District Court's order was a "final decision", and subject to appeal. 28 U.S.C. § 1291. The Fourth Circuit advised Petitioner that the appeal would proceed on an informal briefing schedule.

Petitioner contended on appeal that it was reversible error to give effect to a Maryland Statute in violation of due process of law protections of both the Fifth and Fourteenth amendments of the U.S. Constitution and ignore the process set forth by Congress. Petitioner indicated that he complied with the FTCA, and that he had been advised by attorney agents of the government, including in writing, of the process to follow and the exact Court in which to file a Complaint if one wished to contest a denial of claim, and that a letter with that advice was provided to the District Court. 28 U.S.C. § 1346(b) which provides for exclusive jurisdiction for the District Court was cited. It was noted that a Complaint had to be filed within six months after the mailing of a notice of final denial. See, 28 U.S.C. § 2401(b). Petitioner

contended that the government's Motion to Dismiss on the basis that a claim should have been filed in accordance with the Maryland Health Care Malpractice Claims Act and in accordance with state statutory time limits rather in accordance with the FTCA and in the District Court as specified in its writings, meant that it was seeking to act in derogation of an act of Congress and rights that had been provided Petitioner. Petitioner indicated that the government had a pattern of using its knowledge of case law dating back over twenty years from diversity cases (*Davison v. Sinai Hospital of Baltimore, Inc.*, 462 F.Supp. 778 [D. Md. 1978], aff'd per curiam, 617 F.2d 361 [4th Cir. 1980]), and its misleading notice letters to defeat legitimate claims against it. It was mentioned by Petitioner that in diversity cases, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), was relevant and would prevent forum shopping that could result in a different federal result than would occur in a State case, but in a Federal question case there is no basis for the policy since no State action can be filed and there is no State jurisdiction. Petitioner noted that while the *Davison* decision did find that the preconditions of the Maryland Health Claims statute to be substantive rather than procedural, that the statute itself states it is procedural and it is not known to what degree the issue of Maryland's

own law on interpretation of a statute was litigated and that case, as mentioned, did not involve a Federal question issue. Authority was cited by the Petitioner (*Bailey v. United States*, 116 S. Ct. 501, 506 [1995]; *Sullivan v. Everhart*, 494 U.S. 83, 89 [1990]) that indicated that the statutes enacted by Congress should be adhered to on an FTCA case, and that no reasonable policy was advanced by using the Maryland process. *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136 (1965). Petitioner stated that the Maryland process was enacted to deal with a perceived insurance crisis, and is based on Maryland's statute of limitations rather than the time limits of the FTCA, neither of which is relevant to a Federal question case. The Petitioner mentioned that the fact that the entire process can be unilaterally waived after presentation of a certificate by a health care provider that particular conduct complained of was below a standard of care and had caused damage, meant that it was even less relevant. Petitioner indicated that Maryland has no right to subject Federal question cases to its process, jurisdiction, and statute of limitations when Congress has put forth a different, exclusive, process. Petitioner contended that any attempt by Maryland to subject his Federal question case to its process would violate his Fourteenth amendment due process substantive and

procedural rights and take his property rights in a Federal case. Since the Maryland statutory scheme (See, § 3-2A-06B) mentions the United States District Court in its provisions, and the government has termed it substantive law, Petitioner contended that the Maryland statute was affecting his property right to his cause of action as enacted by Congress. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846-847 (1992), and *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) were cited as authority to show this Court's holdings on how the U.S. Constitution's due process provisions protects a person from arbitrary action and his property rights. When the government contended that the Maryland statute was intended to apply to this type of case, then Petitioner contended that state action has been employed to deprive him of a substantial interest in his property. *Fuentes v. Shevin*, 407 U.S. 67, 84-85 (1972). Since a constitutional taking involving state action would be present if Maryland intended its statute and public policy to apply to a Federal question case, the Petitioner indicated that the Court should apply the *Mathews* balancing test to determine what procedural due process is constitutionally required. The Petitioner also stated his Fifth amendment rights would be violated if there were adherence to the Maryland statute without a legitimate basis. The Petitioner indicated that as

the sovereign, in waiving its immunity, the government set forth the terms of the statutory process to follow and that it could not be ignored and a completely different process and limitations period employed to defeat the intent of Congress.

The fact that the government seemed proud of its conduct and intent to knowingly mislead was mentioned by Petitioner as conduct that should have led to equitable relief, and a sanction to discourage it.

The government also contended that while it was not bound by the Maryland process, and did not have to adhere to it, it was entitled to have the Petitioner go through that process and obtain protection from it as a private person would.

Petitioner noted that the process required by the Maryland statute of filing a certificate of merit and medical report from a physician expert could have been achieved with a filing in the District Court, and without the need for a dismissal and a waiver of jurisdiction.

The Fourth Circuit indicated that it found no reversible error, and affirmed the District Court, per curiam, on October 23, 2009. A

Petition for Panel Rehearing or Rehearing En Banc was denied on January 26, 2010.

REASONS FOR GRANTING THE PETITION

There are few issues as important to a person as some redress for an injury done to him, or her, or to a relative after a medical error has occurred. Nor, are injuries or death as a result of a medical malpractice event, something that is sought out in order to have a claim. While money and some sort of accounting in a process do not rectify the harm done to one, they do lead to some degree of justice, and a hope that similar conduct in the future will be discouraged. Prior to the enactment of the FTCA, the federal government as the sovereign was immune to suit, and when a malpractice occurred, other than through private legislation, there was no process to try to obtain relief. The Congress enacted the FTCA to give individuals a limited opportunity to seek compensation and justice for harms done. When the government is allowed to go beyond seeking to follow the enacted process, to ignore the ultimate intent of Congress, and what is reasonable under the Court's precedents, then a mockery is made of the entire respect for law that should be enhanced through this legislation.

In addition, this Court has the responsibility of providing guidance to lower courts, and the government, on a vital aspect of jurisdiction for the District Court in an area of litigation that will continue to occur with increasing frequency.

I. Review is Warranted Because the Statutory, and Regulatory Scheme Enacted by Congress is Being Thwarted

The FTCA, 28 U.S.C. §§ 1346(b)(1), 2671-2680 (See, App. 14-30), was enacted to govern claims for money damages caused by injury, loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of an agency acting within the scope of his employment, where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred. This includes a medical malpractice action against the government from actions at the Veterans Administration such as is present in the case herein.

The provisions of the FTCA (See, App. 19) indicate that one must first file a claim with the relevant agency, 28 U.S.C. § 2675(a), and do so

within two years of the accrual of the claim, 28 U.S.C. § 2401(b). An action cannot be brought until its denial in writing by notice provided by certified or registered mail (except for inaction by the agency that extends beyond six months). A case must then be brought within six months of the final denial of claim, 28 U.S.C. § 2401(b). The action is properly brought in the United States District Court which has exclusive jurisdiction under 28 U.S.C.§ 1346(b)(1). None of these matters, and their compliance, was raised as being in dispute in this case. Instead, the United States raised an issue about compliance with the Maryland Health Care Malpractice Claims Act, Md. Code Ann., Courts and Judicial Proceedings, § 3-2A-02 *et seq.*, which deals with all claims against a health care provider for medical injury (See, App. 32-41). Since the United States would be liable on tort claims allowed in the same manner and to the same extent as a private individual under like circumstances, 28 U.S.C. § 2674, it incorrectly claimed that Petitioner had to file a "claim", and a Certificate from a qualified expert asserting a departure from the standard of care, with the Maryland agency. The noted Maryland Act states that it "...shall be deemed procedural in nature and may not be construed to create, enlarge...any cause of action not heretofore existing...." (Md. Code Ann., Courts and Judicial Proceedings,

§ 3-2A-10). [App. 41] A private individual who is a health care provider would be subject to the Maryland Act, and could be sued for causing a personal injury under the common law. The State of Maryland, which created this procedural process under its laws for such matters, would have jurisdiction for that type of claim, but that does not pertain to this action. The United States, the District Court, and the Fourth Circuit have confused the fact of an entitlement to make a defense and obtain a Certificate with the issue of exclusive jurisdiction. While a State requirement to file a Certificate from an expert in FTCA cases has been approved based on other statutes in other States, and the Petitioner did not object to his need to file such a Certificate in the United States District Court and argued that he should be allowed to do so, the United States claimed that a dismissal of the Federal question case was needed to allow the filing of a new claim and Certificate in the Maryland forum. See, *Stanley v. United States*, 321 F.Supp. 2d 805, 807-08 (N.D.W.Va. .2004); *Hill v. United States*, 751 F.Supp. 909, 910 (D.Colo.1990); and *Oslund v. United States*, 701 F.Supp. 710, 712-14 (D.Minn.1988) for cases where preliminary procedures for Certificates have been approved. To the knowledge of the Petitioner those other statutes did not require a separate State process and filing before the one in the United States

District Court. However, to the extent other statutes do require a State claim to be filed for a Federal question case, then they also would be in violation of 28 U.S.C.§ 1346(b)(1). Another case that dealt with this issue was *Anderson v. United States,* Case 1:08-cv-00003-CCB (D.Md. August 8, 2008), which the government attached as an exhibit to its Motion to Dismiss (App. 44-52). In *Anderson* the Court dealt with a similar government contention as is present in the instant case and the Maryland statute, but only as a substantive versus procedural issue and not as a jurisdictional one. That decision also found that the District Court action should not be dismissed. The relevant point for the Maryland Act is not that the United States may present a defense that a private individual would have, which it can, in accordance with 28 U.S.C. § 2674, but that in doing so under that provision it cannot confer jurisdiction to the State of Maryland over a claim that can only be brought in the United States District Court. The Petitioner notes that in accordance with the FTCA, a claim cannot be brought against an individual employee or physician for a malpractice matter, and thus no supplemental claim on any person is available to give jurisdiction to the Maryland agency. Nor was such a supplemental claim present in the Complaint brought by the Petitioner. Obviously,

the Petitioner could not confer jurisdiction to Maryland for a claim merely because he was an individual subject to the Maryland Health Care Malpractice Claims Act as was contended by the government. Since the United States is the sovereign it could not be sued under the common law. It can only be sued when it waives sovereign immunity, and in the FTCA it specified the terms of that waiver and created exclusive jurisdiction for the United States District Court. The provision cited by the United States in its Motion to Dismiss did not and could not create a transfer or waiver of the District Court's jurisdiction to the State of Maryland for the purpose of the filing of a claim. The circumstance cited by authority, such as the Fourth Circuit in case law for requiring a preliminary filing, such as compliance with *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), with the Maryland Act for diversity cases, and it being substantive for them, was relevant. Compliance for such cases would prevent forum shopping that could result in a different federal result than would occur in a State case. However, in a Federal question case there is no basis for the *Erie* policy since no State action or claim can be properly filed or litigated in the Maryland process, and there is no State jurisdiction for a different result. While the State of Maryland could have jurisdiction under

the common law on a matter brought as a diversity case, and use its process for it, it may not subject Federal question cases to it. In the terms of the Maryland Act it seems to be doing so, by specifying when a party may transfer a claim to the United States District Court. (See, Md. Code Ann., Courts and Judicial Proceedings, § 3-2A-06B(b)(3) as an example.) Further, the Maryland Act is based on Maryland law (Md. Code Ann., Courts and Judicial Proceedings, § 3-2A-02[d]) and is a completely different process than was established by Congress in enacting the FTCA. An example is the time to file a claim under the Maryland Health Care Malpractice Claims Act (See, Md. Code Ann., Courts and Judicial Proceedings, § 5-109), and the fact that no notice to an agency or preliminary procedure for screening, as is required under the FTCA, is necessary. The Petitioner notes that the government has attempted to exploit this difference by requiring a claimant to follow the separate Maryland time frame for limitations and repose as well as the time limits set out in 28 U.S.C. § 2401(b), even after notice of a claim is provided within two years under the FTCA. Petitioner respectfully suggests that this is also an attempt to thwart the intent of Congress in passing the FTCA and two separate limitation periods is more than just a proper defense being used. Further, while authority exists that federal

law governs on limitations in this matter [See, *Miller v. United States*, 932 F.2d 301, 303 (4th Cir. 1991), which indicates "federal law defines the limitations period and determines when that cause of action accrued...."], that has not prevented the government from claiming otherwise as part of its argument on the substantive law of Maryland and in this case. Seemingly, it intends to narrow the waiver of sovereign immunity that Congress intended and which this Court indicated should not be assumed in viewing the waiver in the FTCA, *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979).

In reviewing a Motion to Dismiss, this Court in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), mentioned that:

> "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." 127 S. Ct. at 1965. Also, "[o]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1969 (quoted in

> *Goodman v. PraxAir*, 494 F.3d 458, 466 (4th Cir. 2007)). Moreover, the "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65.

The Petitioner suggests that he properly stated his entitlement to relief based on the FTCA in the United States District Court under this standard and that a suggested requirement by the government for that court to waive or cede its jurisdiction to another forum was improper, and not in accord with this Court's precedents.

The fact that the Maryland forum had no subject matter jurisdiction over a FTCA claim was not addressed by the District Court, or the Fourth Circuit, or in cases dealing with a diversity action which have been cited by the government in this matter. Maryland could have no valid interest in a FTCA claim based on 28 U.S.C. §1346 (b)(1). A court's actions or the Health Care Alternative Dispute Resolution Office which is organized under Maryland law can be assailed for lack of subject matter jurisdiction if that jurisdiction is lacking in a "fundamental sense". *First Federated Com. Tr. v. Comm'r*, 272

Md. 329, 334, 322 A.2d 539, 543 (1974). "Fundamental jurisdiction" refers to the "power to act with regard to a subject matter which 'is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred.' " *Pulley v. State*, 287 Md. 406, 416, 412 A.2d 1244, 1249 (1980) (quoting *Cooper v. Reynolds' Lessee*, 77 U.S. (10 Wall.) 308, 316, 19 L. Ed. 931, 932 (1870). A court would have fundamental jurisdiction when it has power to render a judgment over a class of cases. *First Federated Com. Tr. v. Comm'r*, supra, 272 Md. at 335, 322 A.2d at 543. Nor does the State of Maryland have the power to contravene Congress on who has jurisdiction on a Federal question case. In waiving sovereign immunity under the FTCA, Congress determines "the terms and conditions under which such suits may be brought." *Summers v. United States*, 480 F. Supp. 347, 349 (D. Md. 1979) (citing *Honda v. Clark*, 386 U.S. 484 [1967]). This Court's guidance for lower courts is necessary to discourage a waiver of the District Court's jurisdiction and a frustration of Congressional intent.

In determining what the relevant statutes such as 28 U.S.C. §1346 (b)(1), 28 U.S.C. §2674 and Md. Code Ann., Cts. & Jud. Proc. §3-2A-10

mean, this Court's precedents indicate that the particular language and purpose of a statute will be examined. "We start, as we must, with the language of the statute." *Bailey v. United States*, 116 S. Ct. 501, 506 (1995). "'[T]he Court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'" *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) [quoting *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)] "Judges should hesitate to treat [as surplusage] statutory terms in any setting." *Bailey v. United States*, 116 S. Ct. 501, 506 (1995); *Dept. of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 340 (1994). The language clearly indicates that the two statutory schemes cannot be joined, and each have jurisdiction when the Federal one has exclusive jurisdiction and a different procedural scheme.

The Petitioner notes that any attempt by Maryland to regulate his Federal question case with either its process or policy would violate the Petitioner's Fourteenth amendment due process substantive and procedural rights and take his property rights in a Federal action in which it could have no interest (App. 14). Substantive due process protects a person from arbitrary and unreasonable actions. See, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833,

846-847 (1992). "Procedural due process imposes constraints on governmental decisions (that) deprive individuals of `liberty' or `property' interests within the meaning of the Due Process Clause." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). If the Maryland statute was intended to apply to this type of case, then state action has been employed to deprive Petitioner of a substantial interest in his property. *Fuentes v. Shevin*, 407 U.S. 67, 84-85 (1972). Since a constitutional taking involving state action is present if Maryland intended its statute and public policy to apply, the Court should apply the *Mathews* balancing test to determine what procedural due process is constitutionally required. *Mathews*, 424 U.S. at 332-335. Petitioner proffers that use of the Maryland statute and its procedural actions create a severe deprivation of property and interferes with his property interest in his right of action which could be avoided by allowing the filing of any Certificate requirement in the District Court. *Fuentes*, 407 U.S. at 84-85. Also, adherence to the Maryland requirement and transfer of jurisdiction to allow a separate claim (where each party can unilaterally waive that process after a Certificate is filed [Md. Code Ann., Courts and Judicial Proceedings, § 3-2A-06B(a)]) merely to allow a Certificate to be filed with it, is without a legitimate basis on a Federal question case. Such

an action violates Petitioner's Fifth Amendment due process substantive and procedural rights, and takes his property rights to his Federal action as specified by Congress. Further, when a fundamental right to redress and to sue for a wrong is being unduly heavily burdened, heightened scrutiny is appropriate. See, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 876 (1992), applying the undue burden test to determine infringement on women's right to abortion. (Plurality Opinion)

Petitioner respectfully suggests that it is blackletter law that subject matter jurisdiction cannot be waived. *Marzitelli v. City of Little Canada*, 582 N.W.2d 904, 907 (Minn. 1998). Thus, the request by the government for a dismissal of Petitioner's Complaint to the District Court so that a claim could be filed elsewhere should have been rejected by it. The Fourth Circuit should be provided guidance by this Court of the manner in which it should enforce the Maryland Certificate filing requirement. That court should be instructed to permit a filing in the District Court rather than allow a waiver of that court's jurisdiction. This Court under 28 U.S.C. § 2072 has the power to prescribe general rules of practice and procedure for cases in the United States District Courts and could if it believes it is necessary formulate such a rule of

practice permitting the filing of a Certificate required by a State process in the District Court.

This Court should review the instant matter to resolve this issue so that the proper procedures are followed by the District Court on jurisdictional matters, and respect for law is maintained.

II. Review is Warranted Because The Court of Appeals' Decision Conflicts With Holdings on Complete Preemption

In the usual circumstance, where one has allegedly filed in the wrong forum, there is litigation over whether the complaint should be removed to Federal Court. Instead, in this case Petitioner is someone who filed in the correct forum, as specified by 28 U.S.C. §§ 1346(b)(1), 2671-2680, and was told to file in a forum which has no jurisdiction over a Federal question case, the wrong forum, so that it could be thereafter removed to the right forum. However, Petitioner suggests that the Maryland statute, Maryland's Health Care Malpractice Claims Act, is completely preempted by the FTCA on Federal question cases.

Preemption issues are statutory

construction issues. As Professor Tribe aptly articulates, "the question of whether federal law in fact preempts state action in any given case necessarily remains largely a matter of statutory construction" and cannot be reduced to any general formula. Laurence H. Tribe, American Constitutional Law §6-25 (2d ed. 1988).

> A state law may be preempted because of a direct or actual conflict with federal law in one of two ways: First, there is preemption . . . if it is impossible to comply with both state and federal law. If dual compliance is not "physically impossible" . . . there is no "actual conflict." Second, state law "actually conflicts" with federal law "where state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Ronald D. Rotunda and John E. Nowak, Treatise on Constitutional Law §12.4 (3d ed. 1999)(quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984)).

Since the Maryland forum would use Maryland law on any claim that is filed with it, such as Maryland's statute of limitations (See,

Md. Code Ann., Courts and Judicial Proceedings, § 5-109), and that would interfere with Petitioner's right to file a Federal question case as provided for in 28 U.S.C. §2401, the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress with regard to his cause of action.

> Finally, "[a] state legislature or court cannot limit the rights that a plaintiff has in a federal claim that is pursued in a state court." Norman J. Singer, Sutherland Statutory Construction §36.08.50 (5th ed. 1993).

The Fourth Circuit's decision in this case contradicts this Court's precedents on preemption, and creates confusion in the Circuits in already doctrinally complicated jurisdictional areas. The Court should grant certiorari to prevent the damage caused by the Fourth Circuit's erroneous determination.

In, *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), the Court held that state law usury claims are completely preempted by the National Bank Act.

The Court stated that the test for

complete preemption is whether federal law "provide[s] the; exclusive cause of action for the claim asserted." *Id.* at 8 (emphasis added); accord *Id.*, at 9 ("[T]he dispositive question in this case [is]: Does the National Bank Act provide the exclusive cause of action for usury claims against national banks?"); *Id.* at 9 n.5 ("the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive").

In the instant case, Petitioner's action is based on 28 U.S.C. §1346 (b)(1) which indicates that exclusive jurisdiction exists for the District Court. Certainly, Congress expressed an intent in the statute that it was to be exclusive, and thus no Maryland State filing requirement should exist.

The Court should grant certiorari in this case to resolve confusion engendered by the Fourth Circuit's decision in this case – on the complete preemption doctrine generally, and on complete preemption in the FTCA setting specifically.

Furthermore, the serious consequences produced by the decision both for the jurisprudence of federal jurisdiction and for the FTCA program buttress the case for granting the

petition.

III. Review is Warranted Because The Court's Guidance is Needed on When the Government Can Be Sanctioned

The United States seems to want it both ways in regard its actions. First, it contends that one should follow the preliminary filing requirement of a State, and not to do so should result in dismissal. Second, it affirmatively tells individuals to file in the District Court regardless of its knowledge of precedent going back over twenty years saying otherwise, and of its own policy to request dismissal when one does not follow that precedent and obey it.

Petitioner proffers that either the notice sent by the government (App. 11) and his position as detailed herein is correct, and one should obey the relevant statute 28 U.S.C. §1346 (b)(1), and file in the District Court, or it is knowingly sent out incorrectly and is being used to deceive individuals to defraud them into losing their ability to bring their claims as intended by Congress with its passage of the FTCA.

The government contends that the notice letters that are sent are in conformance with a regulation, 28 C.F.R. §14.9 that it obeys. (App.

31) However, unlike the average person, as the government it controls the ability to amend the regulation that it claims governs its actions or to supplement it. Given its conduct, and pattern of silence until a case is filed in the "wrong" forum, and the fact that the conduct has existed for an appreciable period of time, it seems clear that an intent to defraud exists. See, also *Anderson v. United States,* Case 1:08-cv-00003-CCB [D.Md. August 8, 2008], where the Court mentioned the silence of the government in not raising the issue of where to file in administrative proceedings.

The United States has claimed that estoppel is not available against it on the same terms as is used on others, apparently even if it commits fraud or affirmative acts intended to mislead. It has contended that its superior knowledge of its intent to apply a standard enunciated for diversity cases to Federal question cases, should have been known to Petitioner as established law, and it is his fault that he did not file in a forum which has no jurisdiction. This was claimed even though obeying its advice would result in the very conduct that it raises an objection about. Petitioner proffers that based on the conduct shown herein, and given the knowledge Respondent had of how the notice was being used by it in FTCA cases, the use of the notice was to mislead and was not as benign as

claimed. Where a party's conduct renders assertion of rights contrary to equity, equitable estoppel would preclude assertion of rights "he otherwise would have against another" person. *First Union Commercial Corp. v. Nelson, Mullins, Riley & Scarborough* (*In re Varat Enters., Inc.*), 81 F.3d 1310, 1317 (4th Cir. 1996). *Board of County Commissioners v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994), found that an act of affirmative misconduct meant an affirmative act of misrepresentation or concealment of a material fact. Such an affirmative misrepresentation or concealment occurred in the instant case. The doctrine of lack of "clean hands" also applies to the request by the United States to dismiss this case after first telling Petitioner to file it in the District Court. "The clean hands doctrine is not applied for the protection of the parties nor as a punishment to the wrongdoer; rather, the doctrine is intended to protect the counts from having to endorse or reward inequitable conduct." *Adams v. Manown*, 328 Md. 463, 474-75, 615 A.2d 611, 616 (1992). Granting the Motion to Dismiss endorses or rewards improper conduct, and should not have been done. The Court should grant certiorari and should clarify when sanctions are available against the government.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the petition for a writ of certiorari should be granted.

APRIL, 2010

Respectfully submitted,

PHILLIP MIZRACH, Pro Se,
as Successor Personal
Representative of the Estate of
Abraham I. Kurland, Deceased
7201-C Harford Road
Baltimore, Maryland 21234
(410) 444-6602
Email: fordslane@verizon.net

Case: 09-1415 Document: 20 Date Filed: 10/23/2009

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 09-1415

PHILLIP MIZRACH, as Successor Personal Representative of the Estate of Abraham I. Kurland, Deceased,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Andre M. Davis, District Judge. (1:08-cv-02030-AMD)

Submitted: October 20, 2009 Decided: October 23, 2009

Before TRAXLER, Chief Judge, NIEMEYER, Circuit Judge, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Phillip Mizrach, Appellant Pro Se. Thomas Harold Barnard, Allen F. Loucks, Assistant United States Attorneys, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Phillip Mizrach, as personal representative of the Estate of Abraham I. Kurland, appeals from the district court's orders dismissing without prejudice his medical malpractice complaint filed pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (2006), and denying his motion for reconsideration. We have reviewed the record and find no reversible error. Accordingly, we

affirm for the reasons stated by the district court. Mizrach v. United States, No. 1:08-cv-02030-AMD (D. Md. Feb. 17, 2009 & Mar. 11, 2009). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Case: 09-1415 Document: 21-1 Date Filed: 10/23/2009 Page: 1
FILED: October 23, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1415
(1:08-cv-02030-AMD)

PHILLIP MIZRACH, as Successor Personal Representative of the Estate of Abraham I. Kurland, Deceased,

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,

Defendant - Appellee

J U D G M E N T

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon

issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR,
CLERK

Case 1:08-cv-02030-AMD Document 23 Filed 03/11/09 Page 1 of 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PHILLIP MIZRACH,	:	
Plaintiff	:	
	:	
v.	:	Civil No.
	:	AMD 08-2030
UNITED STATES OF AMERICA,:		
Defendants	:	

...o0o...

ORDER

Plaintiff's motion to alter judgment having been read and considered, it is this 11th day of March, 200 (sic), by the United States District Court for the District of Maryland, ORDERED

(1) That the motion is DENIED; and it is further ORDERED

(2) That the Clerk shall MAIL A COPY OF THIS ORDER TO PLAINTIFF.

/s/

ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE

Case 1:08-cv-02030-AMD Document 20 Filed 02/17/09 Page 1 of 1

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE
BALTIMORE

U.S. COURTHOUSE
101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
(410) 962-0801
FAX (410) 962-0820
MDDAMDChambers@mdd.uscourts.gov

February 17, 2009

MEMORANDUM TO COUNSEL and to MR. MIZRACH RE:

Mizrach v. United States of America
Civil No. AMD 08-2030

I have before me defendant's motion to dismiss or for summary judgment, which is fully briefed. I have determined to rule in this informal manner.

I agree with defendant that the doctrine of exhaustion of remedies applies in this case and that plaintiff's failure to comply with the Maryland Health Care Malpractice Claims Act, Md. Code Ann., Cts. & Jud. Pro. §§ 3-2A-01 et seq., bars this action as it has been pled. *See generally Lewis v. Waletzky*, 576 F.Supp.2d 732 (D.Md. 2008). As Judge Messitte concluded in *Lewis*, the appropriate outcome here is to dismiss this case without prejudice, *id.* at 738, and that a stay is not warranted.

For the reason stated, this case is dismissed without prejudice by separate Order entered
herewith.

Very truly yours,

/s/

Andre M. Davis
United States District Judge

AMD:tt

Case 1:08-cv-02030-AMD Document 21 Filed 02/17/09 Page 1 of 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PHILLIP MIZRACH,	:	
Plaintiff	:	
v.	:	Civil No. AMD
	:	08-2030
UNITED STATES of AMERICA,:		
Defendant	:	

...o0o...

ORDER

For the reasons stated in the accompanying Letter Memorandum, it is this 17th day of February, 2009, by the United States District Court for the District of Maryland, ORDERED

(1) That the motion to dismiss or in the alternative for summary judgment (Paper No. 5) is GRANTED AND THIS CASE IS DISMISSED WITHOUT PREJUDICE; and it is further ORDERED

(2) That the motions to stay and to permit a surreply (Paper Nos. 7, 18) are DENIED; and it is further ORDERED

(3) That the Clerk shall TRANSMIT a copy of this Order and the foregoing Letter Memorandum to plaintiff pro se and CLOSE THIS CASE.

/s/
ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE

Exhibit A

Seal of Department
of Veterans Affairs

DEPARTMENT OF VETERANS AFFAIRS
Office of the General Counsel
Washington, DC 20420

Date stamp FEB - 7 - 2008

In Reply Refer To:
021: REB

CERTIFIED MAIL

Mr. Philip Mizrach
Attorney at Law
7201-C Harford Road
Baltimore, Maryland 21234

Subject: Administrative Tort Claim - Philip Mizrach, Personal Representative of the Estate of Abraham Kurland
Request for Reconsideration

Dear Mr. Mizrach:

We have now completed our review of your claim that was previously denied by the Baltimore Department of Veterans Affairs (VA) Regional Counsel on July 12, 2007.

Our Review found no evidence that the death of Abraham Kurland was due to a negligent or wrongful act on the part of a VA employee acting within the scope of his or her employment. The claim is, therefore, denied.

If you are dissatisfied with the action taken on your claim, you may file suit in accordance with the Federal Tort Claims Act, sections 1346(b) and 2671-2680, title 28, United States Code, which provides, in effect, that a tort claim which is administratively denied may be presented to a Federal district court for judicial consideration. Such a suit must be initiated, however, within 6 months after the date of the mailing of this notice of final denial as shown by the date of this letter (section 2401(b), title 28, United States Code). If you decide to initiate such a suit, you are further advised that the proper party defendant would be the United States, not VA.

Sincerely yours,

/s/ Kathryn Simpson for
E. Douglas Bradshaw, Jr.
Assistant General Counsel

Case: 09-1415 Document: 24 Date Filed: 01/26/2010 FILED: January 26, 2010 Page: 1

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 09-1415
(1:08-cv-02030-AMD)

PHILLIP MIZRACH, as Successor Personal Representative of the Estate of Abraham I. Kurland, Deceased,

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,

Defendant - Appellee

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Traxler, Judge Niemeyer, and Senior Judge Hamilton.

For the Court

/s/ PATRICIA S. CONNOR, CLERK

Due Process Clause of the United States Constitution, Fifth Amendment, U.S. Const. Amend. V:

> . . . No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Due Process Clause of the United States Constitution, Fourteenth Amendment, U.S. Const. Amend. XIV, § 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .

28 United States Code 2671:

CHAPTER 171 -TORT CLAIMS PROCEDURE

§ 2671. Definitions

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term "Federal agency" includes the executive departments, the judicial

and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes
(1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and . . .
"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101 (3) of title 32, means acting in line of duty.

28 United States Code 2672:

CHAPTER 171 -TORT CLAIMS PROCEDURE

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the

provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 United States Code 2674:

CHAPTER 171 -TORT CLAIMS PROCEDURE

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for

whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled. . . .

28 United States Code 2675:

CHAPTER 171 -TORT CLAIMS PROCEDURE

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an

agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 United States Code 2676:

CHAPTER 171 -TORT CLAIMS PROCEDURE

§ 2676. Judgment as bar

The judgment in an action under section 1346 (b)

of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 United States Code 2677:

CHAPTER 171 -TORT CLAIMS PROCEDURE

§ 2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346 (b) of this title, after the commencement of an action thereon.

28 United States Code 2679:

CHAPTER 171 -TORT CLAIMS PROCEDURE

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346 (b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b) (1) The remedy against the United States provided by sections 1346 (b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.
(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government– (A) which is brought for a violation of the Constitution of the United States, or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.
(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by

the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending.

Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was

not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346 (b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675 (a) of this title, such a claim shall be deemed to be timely presented under section 2401 (b) of this title if– (A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and (B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 United States Code 2680:

CHAPTER 171 -TORT CLAIMS PROCEDURE

§ 2680. Exceptions

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. . . .
(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.
(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5), 64 Stat. 1043.]
(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution,

abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. . . .

28 United States Code 1346:

TITLE 28 -JUDICIARY AND JUDICIAL PROCEDURE
PART IV -JURISDICTION AND VENUE
CHAPTER 85 -DISTRICT COURTS; JURISDICTION

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States

Court of Federal Claims, of:
(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;
(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) (1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section. . . .

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have

exclusive jurisdiction over any civil action commenced under section 453 (2) of title 3, by a covered employee under chapter 5 of such title.

28 Unites States Code 2401:

TITLE 28 -JUDICIARY AND JUDICIAL PROCEDURE
PART VI -PARTICULAR PROCEEDINGS
CHAPTER 161 -UNITED STATES AS PARTY GENERALLY

§ 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.
(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to

which it was presented.

28 Code of Federal Regulations 14.9:

§14.9. Final denial of claim.

(a) Final denial of an administrative claim shall be in writing and sent to the claimant, his attorney, or legal representative by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial and shall include a statement that, if the claimant is dissatisfied with the agency action, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification.
(b) Prior to the commencement of suit and prior to the expiration of the 6-month period provided in 28 U.S.C. 2401(b), a claimant, his duly authorized agent, or legal representative, may file a written request with the agency for reconsideration of a final denial of a claim under paragraph (a) of this section. Upon the timely filing of a request for reconsideration the agency shall have 6 months from the date of filing in which to make a final disposition of the claim and the claimant's option under 28 U.S.C. 2675 (a) shall not accrue until 6 months after the filing of a request for reconsideration. Final agency action on a request for reconsideration shall be

effected in accordance withe provisions of paragraph (a) of this section.

Federal Rules of Civil Procedure

Rule 59. New Trial; Altering or Amending Judgment.

. . . .

(e) Motion to Alter or Amend a Judgment

A motion to alter or amend a judgment must be filed no late than 10 days after the entry of the judgment.

Maryland Code Ann.
Courts and Judicial Proceedings Volume
Title 3. Courts of General Jurisdiction/ Jurisdiction/ Special Causes of Action. **Subtitle 2A. Health Care Malpractice Claim.**

§ 3-2A-02. Exclusiveness of procedures.

(a) Claims and actions to which subtitle applicable.-
(1) All claims, suits, and actions, including cross claims, third-party claims, and actions under Subtitle 9 of this title, by a person against a health care provider for medical injury allegedly suffered by the person in which damages of more

than the limit of the concurrent jurisdiction of the District Court are sought are subject to and shall be governed by the provisions of this subtitle.
(2) An action or suit of that type may not be brought or pursued in any court of this State except in accordance with this subtitle.
(3) Except for the procedures stated in § 3-2A-06(f) of this subtitle, an action within the concurrent jurisdiction of the District Court is not subject to the provisions of this subtitle. . . .

(d) Maryland Rules applicable.- Except as otherwise provided, the Maryland Rules shall apply to all practice and procedure issues arising under this subtitle.

Maryland Code Ann.
Courts and Judicial Proceedings Volume
Title 3. Courts of General Jurisdiction/ Jurisdiction/ Special Causes of Action. **Subtitle 2A. Health Care Malpractice Claim.**

§ 3-2A-04. Filing of claim; appointment of arbitrators; arbitrators' immunity from suit.

(a) Filing of claim and response.-
(1) (i) A person having a claim against a health care provider for damage due to a medical injury shall file the claim with the Director and, if the

claim is against a physician, the Director shall forward copies of the claim to the State Board of Physicians.

(ii) The Director shall cause a copy of the claim to be served upon the health care provider by the appropriate sheriff in accordance with the Maryland Rules.

(iii) The health care provider shall file a response with the Director and serve a copy on the claimant and all other health care providers named therein within the time provided in the Maryland Rules for filing a responsive pleading to a complaint.

(iv) The claim and the response may include a statement that the matter in controversy falls within one or more particular recognized specialties. . . .

(b) Filing and service of certificate of qualified expert.- Unless the sole issue in the claim is lack of informed consent:

(1) (i) 1. Except as provided in item (ii) of this paragraph, a claim or action filed after July 1, 1986, shall be dismissed, without prejudice, if the claimant or plaintiff fails to file a certificate of a qualified expert with the Director attesting to departure from standards of care, and that the departure from standards of care is the proximate cause of the alleged injury, within 90 days from the date of the complaint; and

2. The claimant or plaintiff shall serve a copy of the certificate on all other parties to the claim or action or their attorneys of record in accordance with the Maryland Rules; and

(ii) In lieu of dismissing the claim or action, the panel chairman or the court shall grant an extension of no more than 90 days for filing the certificate required by this paragraph, if:

1. The limitations period applicable to the claim or action has expired; and

2. The failure to file the certificate was neither willful nor the result of gross negligence.

(2) (i) A claim or action filed after July 1, 1986, may be adjudicated in favor of the claimant or plaintiff on the issue of liability, if the defendant disputes liability and fails to file a certificate of a qualified expert attesting to compliance with standards of care, or that the departure from standards of care is not the proximate cause of the alleged injury, within 120 days from the date the claimant or plaintiff served the certificate of a qualified expert set forth in paragraph (1) of this subsection on the defendant.

(ii) If the defendant does not dispute liability, a certificate of a qualified expert is not required under this subsection.

(iii) The defendant shall serve a copy of the certificate on all other parties to the claim or action or their attorneys of record in accordance with the Maryland Rules.

(3) (i) The attorney representing each party, or the party proceeding pro se, shall file the appropriate certificate with a report of the attesting expert attached.

(ii) Discovery is available as to the basis of the certificate.

(4) A health care provider who attests in a certificate of a qualified expert or who testifies in relation to a proceeding before an arbitration panel or a court concerning compliance with or departure from standards of care may not devote annually more than 20 percent of the expert's professional activities to activities that directly involve testimony in personal injury claims.

(5) An extension of the time allowed for filing a certificate of a qualified expert under this subsection shall be granted for good cause shown.

(6) In the case of a claim or action against a physician, the Director shall forward copies of the certificates filed under paragraphs (1) and (2) of this subsection to the State Board of Physicians.

(7) For purposes of the certification requirements of this subsection for any claim or action filed on or after July 1, 1989:

(i) A party may not serve as a party's expert; and

(ii) The certificate may not be signed by:

1. A party;
2. An employee or partner of a party; or
3. An employee or stockholder of any professional corporation of which the party is a stockholder. . . .

Maryland Code Ann.
Courts and Judicial Proceedings Volume
Title 3. Courts of General Jurisdiction/ Jurisdiction/ Special Causes of Action. **Subtitle 2A. Health Care Malpractice Claim**.

§ 3-2A-06B. Waiver of arbitration after filing certificate of qualified expert.

(a) In general.- Arbitration of a claim with the Health Care Alternative Dispute Resolution Office may be waived by the claimant or any defendant in accordance with this section, and the provisions of this section shall govern all further proceedings on any claim for which arbitration has been waived under this section.
(b) Waiver by claimant.-
(1) Subject to the time limitation under subsection (d) of this section, any claimant may waive arbitration at any time after filing the certificate of qualified expert required by § 3-2A-04(b) of this subtitle by filing with the Director a written election to waive arbitration

signed by the claimant or the claimant's attorney of record in the arbitration proceeding.
(2) The claimant shall serve the written election on all other parties to the claim in accordance with the Maryland Rules.
(3) If the claimant waives arbitration under this subsection, all defendants shall comply with the requirements of § 3-2A-04(b) of this subtitle by filing their certificates at the Health Care Alternative Dispute Resolution Office or, after the election, in the appropriate circuit court or United States District Court.
(c) Waiver by defendant.-
(1) Subject to the time limitation under subsection (d) of this section, any defendant may waive arbitration at any time after the claimant has filed the certificate of qualified expert required by § 3-2A-04(b) of this subtitle by filing with the Director a written election to waive arbitration signed by the defendant or the defendant's attorney of record in the arbitration proceeding.
(2) The defendant shall serve the written election on all other parties to the claim in accordance with the Maryland Rules.
(3) If a defendant waives arbitration under this subsection, the defendant shall comply with the requirements of § 3-2A-04(b) of this subtitle by filing the certificate at the Health Care Alternative Dispute Resolution Office, or, after

the election, in the appropriate circuit court or United States District Court.

(d) Time for filing.-

(1) A waiver of arbitration by any party under this section may be filed not later than 60 days after all defendants have filed a certificate of qualified expert under § 3-2A-04(b) of this subtitle.

(2) Any waiver of arbitration after the date specified in paragraph (1) of this subsection shall be in accordance with the provisions of § 3-2A-06A of this subtitle.

(e) Effect of election.- After filing, the written election shall be binding upon all parties.

(f) Filing of complaint; service; dismissal.-

(1) Within 60 days after the filing of an election to waive arbitration by any party, the plaintiff shall file a complaint and a copy of the election to waive arbitration in the appropriate circuit court or the United States District Court.

(2) After filing the complaint, the plaintiff shall serve a summons and a copy of the complaint upon all defendants or the attorney of record for all parties in the health claims arbitration proceeding.

(3) Failure to file a complaint within 60 days of filing the election to waive arbitration may constitute grounds for dismissal of the complaint upon: (i) A motion by an adverse party; and (ii) A finding of prejudice to the adverse party due to

the delay in the filing of the complaint. . . .

(h) Procedure.- In any case subject to this section, the procedures of § 3-2A-06(f) of this subtitle shall apply.
(i) Neutral case evaluation.-
(1) If the parties mutually agree to a neutral case evaluation, the circuit court or United States District Court, to which the case has been transferred after the waiver of arbitration, may refer the case to the Health Care Alternative Dispute Resolution Office not later than 6 months after a complaint is filed under subsection (c) of this section. . . .

(4) Within 10 days after the neutral case evaluation session, the evaluator shall notify, in writing, the Director and the circuit court or United States District Court of the results of the neutral case evaluation.
(5) (i) During the neutral case evaluation period, the circuit court or United States District Court shall continue to have jurisdiction to rule on any motions or discovery matters. (ii) The neutral case evaluation may not interfere with the scheduled trial. . . .

Maryland Code Ann.
Courts and Judicial Proceedings Volume
Title 3. Courts of General Jurisdiction/ Jurisdiction/ Special Causes of Action. **Subtitle 2A. Health Care Malpractice Claim.**

§ 3-2A-10. Construction of subtitle.

Except as otherwise provided in §§ 3-2A-08A and 3-2A-09 of this subtitle, the provisions of this subtitle shall be deemed procedural in nature and may not be construed to create, enlarge, or diminish any cause of action not heretofore existing, except the defense of failure to comply with the procedures required under this subtitle.

Maryland Code Ann.
Courts and Judicial Proceedings Volume
Title 5. Limitations, Prohibited Actions and Immunities.

§ 5-109. Actions against health care providers.

(a) Limitations.- An action for damages for an injury arising out of the rendering of or failure to render professional services by a health care provider, as defined in § 3-2A-01 of this article, shall be filed within the earlier of:
(1) Five years of the time the injury was committed; or

(2) Three years of the date the injury was discovered.

(b) Actions by claimants under age 11.- Except as provided in subsection (c) of this section, if the claimant was under the age of 11 years at the time the injury was committed, the time limitations prescribed in subsection (a) of this section shall commence when the claimant reaches the age of 11 years.

(c) Exceptions to age limitations in certain actions.-

(1) The provisions of subsection (b) of this section may not be applied to an action for damages for an injury:

(i) To the reproductive system of the claimant; or

(ii) Caused by a foreign object negligently left in the claimant's body.

(2) In an action for damages for an injury described in this subsection, if the claimant was under the age of 16 years at the time the injury was committed, the time limitations prescribed in subsection (a) of this section shall commence when the claimant reaches the age of 16 years.

(d) Effect of filing claim.- For the purposes of this section, the filing of a claim with the Health Care Alternative Dispute Resolution Office in accordance with § 3-2A-04 of this article shall be deemed the filing of an action.

(e) Effect of other provisions.- The provisions of § 5-201 of this title that relate to a cause of

action of a minor may not be construed as limiting the application of subsection (b) or (c) of this section.

(f) Application.- Nothing contained in this section may be construed as limiting the application of the provisions of:

(1) § 5-201 of this title that relate to a cause of action of a mental incompetent; or

(2) § 5-203 of this title.

Case 1:08-cv-00003-CCB Document 12 Filed 08/08/08

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

ANGELIA M. ANDERSON :
:
:
v. : Civil No. CCB-08-3
:
UNITED STATES OF AMERICA:
:
:

MEMORANDUM

Plaintiff Angelia M. Anderson ("Ms. Anderson") has sued the United States in a Federal Tort Claims Act action stemming from alleged medical malpractice. Specifically, Ms. Anderson claims that the care she received at the Veterans Administration Medical Center in Baltimore, Maryland ("VA Hospital") was negligent. The United States has moved to dismiss the case. The issue has been fully briefed and no hearing is necessary. See Local Rule 105.6. For the reasons articulated below, the United States's motion will be granted in part and the case will be stayed pending

compliance with the Maryland Health Care Malpractice Claims Act.

BACKGROUND

On February 22, 2002, Angelia M. Anderson arrived at the Baltimore VA Hospital complaining of mid to lower back pain. An MRI was performed, which revealed scattered marrow abnormalities throughout Ms. Anderson's lumbar spine; the radiologist "commented that these findings were suspicious for metastatic disease, and that bone scanning should be performed for further metastatic workup." (Compl. at ¶ 12.) The bone scan was performed on May 13, 2002; the results were abnormal and a bone marrow biopsy performed on July 1, 2002. The biopsy results led to a diagnosis of B-cell lymphoproliferative disease in Ms. Anderson's spine. Ms. Anderson was scheduled to begin chemotherapy on August 26, 2002 and was given a fentanyl patch to control her pain.

Chemotherapy did not begin on August 26th; instead, Ms. Anderson's physicians decided upon a course of observation via blood work and physical examinations. Ms. Anderson was seen again on September 30th, when she reported continued pain on her left side; in response, her pain medication was increased. On December 19,

2002, Ms. Anderson presented to the VA Hospital complaining of increasing pain and troubling new symptoms, including pain and numbness radiating to her foot. After an MRI at the University of Maryland revealed no evidence of cord compression, she was discharged with instructions to report to the neurology clinic. Four days later, she returned to the hospital reporting that she was unable to walk or stand, and that she felt numbness up to the level of her breasts. She was again discharged and instructed to return on December 26th for an MRI.

Ms. Anderson presented to a different local hospital on December 24, 2002, where a physical examination and diagnostic studies revealed an epidural spinal tumor which was compressing her spinal cord. Ms. Anderson underwent a same-day surgery to relieve the spinal compression and remained in the local hospital until December 30th. Ms. Anderson alleges that the VA Hospital "failed to recognize and appreciate signs and symptoms of progressive spinal cord compression due to an epidural spinal tumor which developed as a consequence of Plaintiff's known cancer." (Compl. at ¶ 21.) Among Ms. Anderson's complaints are the VA Hospital's failure to "conduct adequate physical examinations, to order appropriate tests and studies," "to diagnose the presence of the Plaintiff's epidural tumor,"

and "to perform or refer the Plaintiff for timely surgical intervention." (Id.) She claims to have been left with severe and permanent disability, unending physical pain and emotional anguish, among other negative effects.

The United States has filed a motion to dismiss, arguing that Ms. Anderson has not complied with the requirements of the Maryland Health Care Malpractice Claims Act ("HCMCA" or "the Act"). Specifically, Ms. Anderson failed to file a claim with the Maryland Health Claims Alternative Dispute Resolution Office before filing her present suit. Ms. Anderson counters that the Act does not apply to claims brought under the Federal Tort Claims Act ("FTCA").

ANALYSIS

The standard for evaluating a motion for judgment on the pleadings is the same as for a Rule 12(b)(6) motion to dismiss. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999) ("[V]iewing the Defendants' motion as a Rule 12(c) motion does not have a practical effect upon our review, because we review the district court's dismissal de novo and in doing so apply the standard for a Rule 12(b)(6) motion."). Following the Supreme Court's ruling in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007),

"[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." 127 S. Ct. at 1965. "Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Id. at 1969 (quoted in *Goodman v. PraxAir*, 494 F.3d 458, 466 (4th Cir. 2007)). Moreover, the "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65.

The Maryland Health Care Malpractice Claims Act, Md. Code Ann. Cts. & Jud. Proc. § 3-2A-01 *et seq.*, establishes several requirements that must be met before certain medical malpractice actions may be filed. Among these is the requirement that the claim be presented to the Director of the Maryland Health Claims Alternative Dispute Resolution Office. *Id.* at § 3-2A-04(a)(1)(i). The claim must be accompanied by a certificate of qualified expert, which is to be filed with the Director within 90 days from the date of the complaint, and must attest "to departure from standards of care, and that the departure from standards of care is the proximate cause of the alleged injury." *Id.* at §

3-2A-04(b)(1)(i). If the defendant disputes liability, he must file a similar certificate within 120 days from the date that the claimant or plaintiff served her certificate. *Id.* at § 3-2A-04(b)(2)(I). Each party must file the certificate "with a report of the attesting expert attached." *Id.* at § 3-2A-04(b)(3)(i).

Because the FTCA imposes tort liability on the United States "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674, the substantive law of each state establishes the cause of action. If the Maryland statute is deemed procedural in nature, it will be preempted by federal procedural law. This is not the typical *Erie* situation: in this case, the court's jurisdiction arises not from diversity of citizenship, but from the Federal Tort Claims Act. In federal question cases, the discussion of substantive versus procedural is still relevant; if the state statute is procedural, the question becomes whether it is preempted by the Federal Rules of Civil Procedure.

The Maryland statute specifies that "the provisions of [the HCMCA] shall be deemed procedural in nature and may not be construed to create, enlarge, or diminish any cause of action not heretofore existing, except the defense of failure to comply with the procedures required

under this subtitle." Md. Code Ann. Cts. & Jud. Proc. § 3-2A-10. Several courts to have examined the issue, however, have held that in Federal Tort Claims Act cases, state restrictions on malpractice claims may be deemed substantive and should govern. In *Mayo-Parks v. United States*, 384 F. Supp. 2d 818 (D. Md. 2005), the court noted that "[t]he HCMCA [] 'has substantive aspects which, under *Erie*, must be honored by federal courts.'" Id. at 820-21 (quoting *Rowland v. Patterson*, 882 F.2d 97, 99 (4th Cir. 1989)). The opinion did not specify to which aspects of the HCMCA the court was referring, but the comment was made in the context of rejecting the United States's argument that the HCMCA was procedural state law and that the countervailing expert witness certificate requirement did not apply.

Another court within the Fourth Circuit, examining a West Virginia statute that requires a certificate of merit, ruled that the statute was substantive and that the plaintiff was required to comply. *Stanley v. United States*, 321 F. Supp. 2d 805, 807 (N.D.W.Va. 2004). The court noted that although the Fourth Circuit had not addressed the specific issue of whether the statute was substantive or procedural, it "has held that similar statutes are 'substantive.'" *Id.* (citing *Roth v. Dimensions Health Corp.*, 992 F.2d 36

(4th Cir. 1993), and *Davison v. Sinai Hosp.*, 617 F.2d 361 (4th Cir. 1980). 1

In reaching the same conclusion with regards to a Minnesota law, the court pointed out that if the Minnesota statute was held to be purely procedural (and thus preempted by the Federal Rules in federal question cases), "the anom[a]lous result would be that the federal government would be exposed to liability when a cause of action involving similar conduct would be dismissed in a diversity case or in a state court action." *Oslund v. United States*, 701 F. Supp. 710, 714 (D. Minn. 1988). That court held that the Minnesota statute was substantive. *Id.* The Tenth Circuit has agreed. *See, e.g., Hill v. Smithkline Beecham Corp.*, 393 F.3d 1111, 1117-18 (10th Cir. 2004).

Ms. Anderson also argues that the United States's denial of her administrative claim is a "clear indication of the intent to conduct further litigation before the United States District Court," and that the court should treat that denial as a mutual waiver of the HCMCA's prefiling requirements. (Pl's Opp'n 11.) Apart

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1 . In both Roth and Davison, the court's jurisdiction arose from diversity of citizenship, not federal question.

from the administrative claim proceedings, the court has been presented with no evidence suggesting that the United States has waived the HCMCA requirements, and declines to speculate as to the defendant's intention to conduct further litigation.

Given that the prefiling requirements of the HCMCA are substantive in nature, those requirements apply in FTCA cases, and Ms. Anderson was required to submit her claim to the Maryland Health Claims Alternative Dispute Resolution Office. She did not. As the United States points out, however, the HCMCA is not jurisdictional under Maryland law. *Oxtoby v. McGowan*, 447 A.2d 860, 864-65 (Md. 1982).

Given the circumstances of this case and the closeness of the question, which apparently was not raised by the defendant at any earlier point in the administrative proceedings, the case will be stayed rather than dismissed while the plaintiff satisfies the conditions of the Act, in order to avoid creating any statute of limitations bar. *See Jewell v. Malamet*, 587 A.2d 474, 481 (Md. 1991).

A separate Order follows.

August 8, 2008
Date

/s/
Catherine C. Blake
United States District Judge